FOR ARGUMENT

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In the Supreme Court of the United States

DOMINO'S PIZZA, LLC, DOMINO'S PIZZA, INC., AND DEBBIE PEAR,

PETITIONERS,

v.

JOHN MCDONALD,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. MCDONALD MAY NOT ENFORCE JWM'S CONTRACTS 2

A. Section 1981 Protects Only Contract Rights 2

B. McDonald's Semantic Arguments Lead to Unbounded Liability 4

C. The "Actual Target" Distinction is Inconsistent with § 1981 and Unworkable 5

1. This Court's Cases Do Not Support McDonald's "Actual Target" Theory 5

2. The "Actual Target" Test Is Unworkable 8

II. THERE IS NO VIABLE § 1981 CLAIM BASED ON ANY MCDONALD - JWM CONTRACT 10

A. The Complaint Alleges No Relevant Contract, or Impairment of Any Contractual Rights 11

B. McDonald Has No Claim for Derivative Injuries from a Violation of JWM's Rights 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Adams v. Pan American World Airways, Inc.,
828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 (1988), *and cert. denied*, 485 U.S. 485 U.S. 961 (1988) 20

Associated General Contractors of California, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983) 17, 19, 20

Baldwin v. Reese,
541 U.S. 27 (2004) 11

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,
402 U.S. 313 (1971) 18

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 16

Blue Shield of Virginia v. McCready,
457 U.S. 465 (1982) 18

Brian Clewer, Inc. v. Pan American World Airways, Inc.,
674 F. Supp. 782 (C.D. Cal. 1986) 20

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) 13

Burnett v. Grattan,
468 U.S. 42 (1984) 2

TABLE OF AUTHORITIES—Continued

Page(s)

Camacho v. Puerto Rico Ports Authority,
369 F.3d 570 (1st Cir. 2004) 9

Consolidated Rail Corp. v. Gottshall,
512 U.S. 532 (1994) 4

Danco, Inc. v. Wal-Mart Stores, Inc.,
178 F.3d 8 (1st Cir. 1999), *cert. denied*, 528 U.S.
1105 (2000) 5

Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate,
416 F.3d 1025 (9th Cir. 2005) 10

Federal Election Commission v. NRA Political Victory Fund,
513 U.S. 88 (1994) 6

Galabya v. New York City Board of Education,
202 F.3d 636 (2d Cir. 2000) 13

General Building Contractors Association v. Pennsylvania,
458 U.S. 375 (1982) 13

Georgia v. Rachel,
384 U.S. 780 (1966) 2

Goodman v. Lukens Steel Co.,
482 U.S. 656 (1987) 6

Haugerud v. Amery School District,
259 F.3d 678 (7th Cir. 2001) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Hollins v. Atlantic Co.,
188 F.3d 652 (6th Cir. 1999) 13

Holmes v. Securities Investor Protection Corp.,
503 U.S. 258 (1992) 2, 15, 16, 17, 18

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977) 17

Jackson v. Birmingham Board of Education,
125 S. Ct. 1497 (2005) 19

Jett v. Dallas Independent School District,
491 U.S. 701 (1989) 16

Lipshie v. Tracy Investment Co.,
566 P.2d 819 (Nev. 1977) 4

Moran v. Aetna Life Insurance Co.,
872 F.2d 296 (9th Cir. 1989) 11

Nathan P. v. West Springfield Public Schools,
362 F.3d 143 (1st Cir. 2004) 11

Olzman v. Lake Hills Swim Club, Inc.,
495 F.2d 1333 (2d Cir. 1974) 7

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 2, 3, 7

Pepe v. GMAC,
604 A.2d 194 (N.J. Super. Ct. App. Div. 1992) 12, 13

TABLE OF AUTHORITIES—Continued

Page(s)

Pillsbury, Madison & Sutro v. Lerner,
31 F.3d 924 (9th Cir. 1994) 20

Pitchford v. PEPI, Inc.,
531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S.
935 (1976) 12

Potthoff v. Morin,
245 F.3d 710 (8th Cir. 2001) 10, 12

Powers v. Ohio,
499 U.S. 400 (1991) 10

Pryor v. Sloan Valve Co.,
487 N.W.2d 846 (Mich. Ct. App. 1992) 14

Runyon v. McCrary,
427 U.S. 160 (1976) 6

Shaare Tefila Congregation v. Cobb,
481 U.S. 615 (1987) 7

Sherman v. British Leyland Motors, Ltd.,
601 F.2d 429 (9th Cir. 1979) 4

Sibley Memorial Hospital v. Wilson,
488 F.2d 1338 (D.C. Cir. 1973) 9

Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,
245 U.S. 531 (1918) 15

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Tillman v. Wheaton-Haven Recreation Association,
410 U.S. 431 (1973) 7

Trafficante v. Metropolitan Life Insurance Co.,
409 U.S. 205 (1972) 16

United States v Standard Oil,
332 U.S. 301 (1947) 17

Warth v. Seldin,
422 U.S. 490 (1975) 16

Youakim v. Miller,
425 U.S. 231 (1976) 11

Zaklama v. Mt. Sinai Medical Center,
842 F.2d 291 (11th Cir. 1988) 9

STATUTES

18 U.S.C. § 1964(c) 2

42 U.S.C. § 1981(a) 4
42 U.S.C. § 1981(b) 3
42 U.S.C. § 1981(c) 19

42 U.S.C. § 1983 10

OTHER AUTHORITY

11 Arthur Linton Corbin, *Corbin on Contracts*
§ 1038 (interim ed. 2002) 12

TABLE OF AUTHORITIES—Continued

Page(s)

2 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 266 (perm ed., rev. vol. 1998) 11

Restatement (Second) of Agency § 363 (1958) 5

Supreme Court Rule 15.2 11

ARGUMENT

McDonald's central contention is that an "actual target" of discrimination may recover under 42 U.S.C. § 1981 even if he has suffered no injury to the right to "make and enforce contracts." That theory is untenable for three reasons. First, McDonald's theory is inconsistent with the statute. This "actual target" rhetoric is a way of evading the central fact that McDonald's own right "to make and enforce contracts" on the same terms as white citizens has not been violated. Even if he was the "actual target" of a racial slur or racial animus, JWM was the only "actual target" of alleged conduct that would violate § 1981. Second, it is wrong as a description of this Court's cases. This Court has allowed recovery under § 1981 by contracting parties, or by intended third-party beneficiaries, but has never endorsed claims by third parties who lack any contract rights. Third, the "actual target" distinction supplies no coherent limiting principle. It opens the door to endless piggy-back lawsuits by plaintiffs claiming to be the "actual target" of some form of discrimination incident to a violation of someone else's right "to make and enforce contracts."

McDonald also argues in the alternative that Domino's can be liable for interfering with his own alleged contractual relations *with JWM*. First, this is an entirely new theory of relief never raised until the merits stage in the Supreme Court, and is therefore forfeited. Second, the complaint simply does not allege any such contractual relationship, nor that Domino's actually interfered with, or intended to interfere with, McDonald's contractual relations with JWM. Finally, the only injuries directly inflicted on McDonald were emotional harms stemming from an alleged racial slur. Dignitary harms like these have little to do with the contractual rights protected by § 1981 and, on these facts, would not even be actionable under Title VII if inflicted by an employer. The rest of McDonald's alleged injuries are entirely derivative—downstream consequences of a

violation of *JWM*'s rights under § 1981. This Court has repeatedly refused to recognize causes of action for derivative injuries, even when a statute authorizes suit by "any person injured ... by reason of" a statutory violation. *E.g.*, 18 U.S.C. § 1964(c); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992). McDonald offers no persuasive argument for permitting such recovery to a sole shareholder through the implied right of action recognized under § 1981.

I. MCDONALD MAY NOT ENFORCE JWM'S CONTRACTS

A. Section 1981 Protects Only Contract Rights

McDonald continually seeks to obscure the actual contours of § 1981 by arguing that it prohibits all discrimination that could interfere with a plaintiff's full and equal participation in the economy. McDonald believes that § 1981 protects a broadly defined right to engage in "economically significant activity," Resp. Br. 15; to "hold and enjoy the proceeds of [one's] toils," *id.* at 16; and to "participate in the economic life of the nation" free from racial discrimination, *id.* at 17. Thus, according to McDonald, he has stated a claim under § 1981 to "conduct business ... unimpeded by racial discrimination." *Id.*

Congress did not create a cause of action for any person injured by the effects of racial discrimination in the economy; it guaranteed the same right "to make and enforce contracts." This Court has recognized that § 1981 only applies to "specific activities, such as making contracts," *Burnett v. Grattan*, 468 U.S. 42, 44 n.2 (1984), and "protect[s] a limited category of rights." *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). Any doubt on that score was firmly laid to rest in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, a credit union teller brought a § 1981 claim against her employer alleging that she was harassed and ultimately discharged because of her race. Discriminatory termination is obviously a vastly larger threat to the ability of racial minorities to participate

equally in the economy than the emotional harms and derivative financial injuries alleged here. Nonetheless this Court recognized that "[t]he most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief." *Patterson*, 491 U.S. at 176 (alterations in original). This Court held that § 1981 protected *only* a narrowly defined right first to "make" contracts and then to enforce any breach through ordinary legal process, and that discriminatory performance or termination did not violate the statute so long as the plaintiff still had access to the courts. *Id.* at 177-78. That holding is flatly inconsistent with McDonald's broad claims about the original intent of § 1981. Although Congress partially superseded *Patterson* by statute, the 1991 amendments clarified only that § 1981 now applies to "the making, performance, modification, and termination *of contracts*," and protects the "benefits, privileges, terms, and conditions *of the contractual relationship*." 42 U.S.C. § 1981(b) (emphasis added).

McDonald protests that enforcing the plain language of § 1981 may force minority businessmen into an unfair choice between the benefits of incorporation and the protections of § 1981. Resp. Br. 31-33. He argues that, for purposes of the § 1981 right to "make and enforce contracts," a minority entrepreneur should be permitted either to (a) invoke the contract rights of his employer, even though he is neither a party to nor an intended beneficiary of that contract, or (b) disregard the separate existence of his wholly-owned corporation and be treated as a party to the corporation's contracts. *Id.* The essence of his position is that subjecting the choices of minority entrepreneurs to precisely the same contract law consequences as white entrepreneurs will fail to fully implement the vision of eradicating all vestiges of racial discrimination from our economy.

That is not a permissible interpretation of § 1981. As this Court recognized in *Patterson*, § 1981 is not a comprehensive charter of economic equality. It guarantees only the "same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The rights claimed by McDonald are not the "same right[s]" enjoyed by white citizens, but entirely new rights never previously recognized by the law of Nevada or any other state. *See, e.g., Lipshie v. Tracy Inv. Co.*, 566 P.2d 819, 824-25 (Nev. 1977) (third party must be specifically intended beneficiary); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440 n.13 (9th Cir. 1979) (president/sole shareholder is at most an incidental beneficiary). The plain language indicates that Congress did not authorize the federal courts to disregard the consequences of state contract and corporations law when doing so would broaden the coverage of § 1981.[1]

B. McDonald's Semantic Arguments Lead to Unbounded Liability

McDonald argues that a person who does not have or desire any contract of his own may nonetheless bring claims under § 1981 if he is seeking to "make" or "enforce" a contract as an agent on behalf of a principal. Resp. Br. 11-12. But while an agent may "make" a contract for a principal, and a judge may "enforce" a contract by litigants, these extended semantic possibilities are not the meaning of "make" or "enforce" intended by § 1981. An agent contracting on behalf of a principal has no *personal* contract

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[1] McDonald commits a similar error by complaining that, under petitioners' interpretation of § 1981, mental anguish and humiliation will not be recoverable when a corporation possesses the contract rights at stake because corporations do not have feelings. Resp. Br. 27-28. That is true, but simply a neutral principle of state contract law. White citizens are equally bound by that principle, and by the related rule that emotional injuries suffered by witnesses to an actionable wrong cannot recover. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

right at stake, and so any interference with that process impairs only the principal's right to "make and enforce contracts." *See* Restatement (Second) of Agency § 363 (1958) (agents making contracts on behalf of principals have no individual contract claims).

The dangers inherent in these semantic games become obvious when McDonald points out that § 1981 now covers the "performance" of a contract, and argues that employees necessarily "perform" their employers' contracts in some sense. Resp. Br. 13. That approach would create a truly breathtaking cause of action. If GM cancels a contract with IBM, every IBM employee who would have performed some work duties related to that contract would have an individual § 1981 cause of action against GM for whatever "personal" injuries he or she can allege. Presumably those injuries would include derivative harms from lost bonus or promotion opportunities as well as emotional injuries. That cannot be the law. *See Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999) ("Nothing in section 1981 provides a personal claim ... to one who is merely affiliated—as an owner or employee—with a contracting party that is discriminated against by the company that made the contract."), *cert. denied*, 528 U.S. 1105 (2000).

C. The "Actual Target" Distinction is Inconsistent with § 1981 and Unworkable

McDonald attempts to disguise the breadth of his position by suggesting that only the "actual target" of discrimination can sue. But there is no basis in the text or this Court's cases for applying § 1981 to an "actual target" of discrimination who has not suffered any injury to his own right "to make and enforce contracts." That test also fails to cabin the reach of the statute in any sensible way.

1. This Court's Cases Do Not Support McDonald's "Actual Target" Theory

McDonald claims that several of this Court's prior § 1981 cases support his "actual target" theory. They do not.

First, this Court has held that cases assuming statutory standing without discussion are "drive by" rulings not entitled to precedential weight. *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). Yet McDonald's entire argument depends on the assumption that because this Court did not address statutory standing in prior § 1981 cases, then standing necessarily existed.

Second, none of the cases cited by McDonald employ or discuss the "actual target" distinction he advocates, and most are more readily explained by the principle that an intended third-party beneficiary has standing to "enforce" a contract. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the plaintiffs were minor children and their parents who sued two schools on the ground that the schools denied admission to the children because of their race. In holding that § 1981 covered private contracting, this Court never questioned that the children had sufficient contract rights at stake. The children were clearly intended beneficiaries, so it is unsurprising that no party or court raised the issue.

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987), involved union workers who sued their employer and unions for racial discrimination. *Goodman*, like *Runyon*, fits comfortably into the intended third-party beneficiary rubric; of course the minority employees were the intended beneficiaries of a contract between their employer and their union prohibiting discrimination in employment. Moreover, the plaintiffs alleged that the union actually barred their access to legal process, and thus violated their right to "enforce" their contract rights. As this Court noted in *Patterson*, the plaintiffs in *Goodman* had stated a viable claim because § 1981 applies to private efforts to "obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations," at least where the unions "bear explicit responsibilities to process grievances, press claims, and represent member in disputes over the terms of binding

obligations that run from the employer to the employee." *Patterson*, 491 U.S. at 177 (citing *Goodman*).

McDonald's discussion of *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), is a particularly bold attempt to transform this Court's silence on an issue it was never asked to address into a holding. Nowhere in this Court's two-page opinion in *Shaare Tefila* did this Court ever mention, let alone analyze, exactly what the property right held by the congregants themselves was, and whether that right was sufficient to create statutory standing under § 1982. Nor is there any reason to believe this Court would have been thinking of the issue since it was not included in the question presented or raised by the parties. In any event, some courts have held that because § 1982's text protects an ill-defined right to "hold" property, even invited guests literally fit within the protection of the statute. *Cf. Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (2d Cir. 1974). Section 1981's language is much narrower.[2]

In *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), the plaintiffs included a black family challenging the center's membership policy as well as a white family and their black guest challenging its guest policy. The plaintiffs sued under § 1981, § 1982, and Title II of the Civil Rights Act of 1964. This Court addressed primarily the black family's claim under § 1982 to become members. This Court held that the center was not a private club, and consequently was subject to § 1982. As to the guest policy claim, this Court merely noted that "[o]n remand the District Court will develop any necessary facts concerning the adoption of the guest policy and will evaluate the claims of the parties." *Id.* at 440. This Court made no

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[2] The other § 1982 case McDonald cites, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), likewise does not help him. While this Court permitted the white homeowner to pursue a claim arising from his expulsion for transacting with a black tenant, the homeowner, unlike McDonald, actually had his own property (and contract) rights at stake.

mention of the guest's standing. In any event, her standing under § 1981 could be justified on the ground that the white family sought to make a contract allowing black guests of which she would be the intended third party beneficiary.

2. The "Actual Target" Test Is Unworkable

In any event, McDonald's proposed "actual target" distinction is based more on rhetoric than substance. In what sense was McDonald the "actual target" of this alleged conduct, if he did not suffer any injury to his own personal right to "make and enforce contracts"? There are several possibilities, but none of them suggests a workable framework for extending § 1981 beyond the statutory text.

McDonald may be alleging simply that he was the "actual target" of a racial slur and racial animosity from individual petitioner Debbie Pear Phillips. But § 1981 guarantees the right to "make and enforce contracts" on the same terms as white citizens, not a general right to be free from racial insults. The only "actual target" of alleged racial discrimination in *contracting* here was JWM. Nothing in the language, history, or structure of § 1981 suggests that Congress intended to create a remedy for a person who was the "actual target" of racial slurs or non-contractual racial animus, merely because that conduct happens to be incident to, or transactionally related to, some other conduct that violates the actual § 1981 rights of a different person.

Any such cause of action would be both radical and arbitrary. Federal law does not generally provide any cause of action for emotional or dignitary injuries stemming from a racial insult like this one. Persons who suffer such injuries in the general neighborhood of a violation of § 1981 are no more deserving than persons who suffer such insults on the street. And ordinary employees have no redress for racial insults from their own employers unless those insults become so severely or pervasively abusive that they create a hostile work environment. Pet. Br. 33-35. In the world McDonald proposes, an employee would have no remedy if

he suffered a simple racial insult from his employer, and generally no remedy if he suffered a racial insult from an outsider—but would have a remedy if that outsider later breached a contract with his employer for discriminatory reasons. That is illogical and threatens to open the floodgates to individual employee litigation. If GM cancels a contract with IBM for reasons believed to be racially discriminatory, then every minority employee of IBM could claim to be the "target" of that discrimination and sue for emotional injuries (and financial injuries) incident to it.[3]

McDonald might instead be claiming to be the "actual target" of the alleged discrimination against JWM in the sense that his ethnicity was arguably the *reason* for that discrimination. But nothing in § 1981 suggests a cause of action for persons who are the *reason* for contractual discrimination against someone else. That rule would also be arbitrary and unworkable. If GM cancels its contract with IBM, and IBM's employees believe that the reason is GM's general aversion to working with a company with so many minority employees, then every minority employee of IBM would be the "reason" for the discrimination and would have an individual cause of action against GM on this theory. If it were later revealed that GM canceled the contract because it wished to avoid one particular minority employee of IBM, then that one employee would have an individual cause of action but the rest would not—even though they may all have suffered quite similar dignitary (and derivative financial) injuries. And pushed to its logical limits the theory simply becomes absurd. If he can allege a racial

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[3] McDonald wrongly suggests that his approach is necessary to ensure that temporary workers and subcontractors are protected from serious discrimination by their principal supervisors. The lower courts have recognized that such supervisors can be liable under both Title VII and § 1981 as de facto employers. *See, e.g., Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1342 (D.C. Cir. 1973); *Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 574-75 (1st Cir. 2004); *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291, 293-95 (11th Cir. 1988).

motive, a minority spokesman or celebrity who produces an advertisement for a company would have a personal cause of action against any prospective customer that does not buy the product. A prominent black politician who eats at a particular restaurant would have a cause of action against white patrons who avoid that restaurant because of his presence. The students at a historically black college would have a cause of action against white students who choose not to enroll. None of this has anything to do with the specific interests that § 1981 was designed to protect.[4]

II. THERE IS NO VIABLE § 1981 CLAIM BASED ON ANY MCDONALD - JWM CONTRACT

Perhaps recognizing that he is in no position to "make and enforce" the JWM-Domino's contracts, McDonald now suggests that Domino's can be liable for denying him the right to "make and enforce contracts" *with JWM*. McDonald never raised this argument in his opposition to the motion to dismiss, his briefs to the Ninth Circuit, or his opposition to certiorari. Neither of the courts below considered it. It is

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[4] McDonald, and several States as amici, argue that States need not be concerned about the scope of liability under § 1981 because they would be liable anyway under the Equal Protection Clause as enforced through 42 U.S.C. § 1983. Although both § 1981 and the Equal Protection Clause require intentional discrimination, they are not necessarily "otherwise co-extensive." *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 416 F.3d 1025, 1038 (9th Cir. 2005). The Ninth Circuit's interpretation of § 1981 here would permit anyone affected by alleged discrimination to sue, without regard to whether he was discriminated against himself, or even a minority. *See* Alabama Br. 2, 30. Third-party standing principles plainly would preclude an equal protection challenge in similar circumstances. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 410-15 (1991). And the lower courts have imposed strict limitations on shareholder/employee standing under § 1983 that are clearly incompatible with McDonald's interpretation of § 1981. *See, e.g., Potthoff v. Morin*, 245 F.3d 710 (8th Cir. 2001) (sole shareholder lacks standing under § 1983 to sue for injuries derivative of harm to his corporation, such as lost salary and commissions). If § 1981 and § 1983 *are* coextensive, those principles provide another basis for rejecting this claim. Regardless, the States do have a keen interest in seeing this construction of § 1981 corrected.

forfeited.[5] Regardless, the complaint will not support such a theory. It does not genuinely allege any relevant contract between McDonald and JWM, or intentional impairment of that contract. And even if a hypothetical contract could be divined from the complaint, his claim violates the venerable presumption against recovery for derivative injuries.

A. The Complaint Alleges No Relevant Contract, or Impairment of Any Contractual Rights

McDonald's theory of this case has always been that Domino's wrongfully breached its contracts with JWM. The complaint's Statement of Facts never once mentions any contract between JWM and McDonald, and the Cause of Action section focuses exclusively on the allegation that Domino's breached its contracts with JWM. Pet. App. 11-17.

McDonald argues that he has an employment contract with JWM because the federal tax code would probably treat him as an "employee" subject to employment taxes. Resp. Br. 37. But characterizing someone as an "employee" for purposes of a federal tax statute does not create a contract under state law. Likewise, the fact that the Model Business Corporations Act treats officers as "employees" for some purposes does not create a contract.[6]

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[5] *See Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (argument raised for first time in respondent's merits brief deemed waived); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]."). Even in the context of a motion to dismiss, a defendant has a basic obligation to explain to the court *why* his complaint states a viable claim. *See Nathan P. v. W. Springfield Pub. Schs.*, 362 F.3d 143, 146 (1st Cir. 2004); *cf. Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 300 (9th Cir. 1989). And the petition for certiorari stated that "there is no employment contract" at issue and that "McDonald asserted no independent ... right of his own in this case." Pet. 9, 14. This Court's Rule 15 required McDonald to identify any perceived misstatements in the petition (Sup. Ct. R. 15.2); he did not.

[6] Fletcher notes that the Model Act's definition of "employee" includes officers only "for the purpose of making officers eligible for loans from the corporation." 2 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 266 at 12 n.8 (perm. ed., rev. vol. 1998).

McDonald strains to infer "an obligation for some entity to pay McDonald a salary" from the complaint's cryptic demand for "front pay [and] back pay." Resp. Br. 37-38. But a boilerplate request for remedies does not remotely establish a contractual entitlement to wages. McDonald's claim to have lost "pay" is just a transparent repackaging of his right, as sole shareholder, to JWM's net profits—a status that even he concedes cannot support standing under § 1981. The lower courts have consistently rejected such evasions.[7]

Indeed his own brief concedes that he had no genuine entitlement to wages. As McDonald acknowledges, any salary obligations JWM "actually paid or was still obligated to pay" were recoverable *by JWM* in its own breach of contract action against Domino's, and therefore have already been fully compensated by the settlement. Resp. Br. 28. McDonald argues that his demand for backpay under § 1981 is nonetheless still viable because it seeks "contract payments from Domino's [that] would have been used to pay an employee who never became entitled to wages at all." *Id.* In other words, to avoid the bar on duplicate recovery he admits JWM owed him nothing.[8]

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[7] *See, e.g., Pitchford v. PEPI, Inc.*, 531 F.2d 92, 97-98 (3d Cir. 1975) ("Mr. Pitchford alleged that his salary as president of the firm was less than it would have been ... . Mr. Pitchford cannot, however, obtain standing merely by shifting profit from his shareholder pocket to his officer pocket."), *cert. denied*, 426 U.S. 935 (1976); *Potthoff*, 245 F.3d at 716-18 (sole shareholder lacks standing under § 1983 to sue for injuries derivative of harm to his corporation, such as lost salary and commissions); *Pepe v. GMAC*, 604 A.2d 194, 196 (N.J. Super. Ct. App. Div. 1992) ("The law is clear and uniform: shareholders cannot ... assert individual claims for wages or other income lost because of injuries assertedly done to their corporations," including losses sustained because of personal guarantees of corporate debts.).

[8] That analysis is wrong as a matter of contract damages law in any event. Even if JWM would have ultimately paid out its net profits at the end of the year to McDonald as discretionary "salary" rather than as dividends, the loss of those profits is not an expense saved by the breach. *See, e.g.*, 11 Arthur Linton Corbin, *Corbin on Contracts* § 1038, at 206

McDonald in fact repeatedly concedes that "JWM did not breach its contractual relationship with McDonald." Resp. Br. 44. His theory instead is that "Domino's prevented McDonald from carrying out his duties as JWM's president and operator," *id.*, by "impairing his ability to perform the parts of his job ... that required him to interact with a major customer," *id.* at 45-46. That is not a cognizable injury to his right to "make and enforce contracts." Employees have no implied contractual right to work on a specific client's matters. And since McDonald kept his job title, benefits, and responsibilities, this change did not even alter the "terms and conditions" of his employment as that phrase is understood in Title VII.[9] McDonald's suggestion that an employee suffers an actionable injury to his ability to "perform" his employment contract whenever his employer loses a client would be a radical innovation. *Supra* at 5; Pet. Br. 32-33. Moreover, there is no allegation that Domino's knew about any employment contract between McDonald and JWM, or intended to impair his employment. Pet. Br. 25 n.12. Section 1981 prohibits only intentional discrimination. *See Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). The complaint alleges that Domino's wanted to end its own relationship with JWM and McDonald. It alleges that Ms. Phillips threatened "serious financial

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(interim ed. 2002) ("The only saving that is to be deducted is the saving of expense with respect to performance by the plaintiff that the defendant's breach has made unnecessary"). McDonald's analysis would let persons breach contracts with small corporations with impunity, by claiming that any eventual profit would have been taken out of the company as salary.

[9] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) ("significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different job responsibilities, or a decision causing a significant change in benefits"); *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (change "'must be more disruptive than ... an alteration of job responsibilities.'") (citation omitted); *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (same); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 691-92 (7th Cir. 2001) (same).

reproductions [sic] and the loss of his business and financial position," which is simply a threat to destroy JWM. Pet. App. 12. It does not allege that Domino's cared at all about McDonald's own relationship with JWM, or canceled this contract because it wanted to affect the tasks he performed for JWM. *See Pryor v. Sloan Valve Co.*, 487 N.W.2d 846, 849 (Mich. Ct. App. 1992) (allegation that defendants intended to interfere with plaintiffs' relationships with plaintiffs' own corporations is "ludicrous" on its face).

McDonald also suggests that this Court can infer a contract between JWM and McDonald relating to McDonald's rights as a shareholder. Resp. Br. 39. But even if the relationship between a shareholder and a corporation can be characterized as "contractual," McDonald has not mustered any coherent allegation that his rights under that contract were affected here. He does not allege, for example, that Domino's stole his stock certificates or attempted to disrupt his ability to convene a meeting of JWM's board. It is undisputed that McDonald retained his status and rights as a shareholder. Thus even if "discriminators' efforts to prevent blacks from acquiring and benefiting from shareholder status fall within the purview of section 1981," Resp. Br. 44, that is irrelevant here. McDonald's suggestion that Phillips's alleged threats or his own emotional injuries "impair[ed] his status as the black owner of a corporation," *id.* at 39, is either plainly wrong or just another allegation that he lost profits as a shareholder.

B. McDonald Has No Claim for Derivative Injuries from a Violation of JWM's Rights

McDonald's claim also must fail because he offers no persuasive justification for abandoning the traditional presumption against recovery for derivative injuries. The sole direct injury to McDonald alleged in this case is emotional harm from a racial slur. Any such harm cannot support a cause of action under § 1981 because that comment did not violate or interfere with any *contractual*

rights between McDonald and JWM. Pet. Br. 33-35. McDonald's other alleged injuries are entirely derivative of a direct injury to JWM's right "to make and enforce contracts," and thus cannot be recovered.

The common law demanded a "direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's act was generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69. "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.). That principle has taken "many shapes" in the law, 503 U.S. at 268, including the ban on recovery for derivative injuries, proximate cause principles, the privity requirement in contract, and the prudential standing rule barring recovery for injury caused by violation of a third-party's rights.

McDonald's discussion of § 1981 claims in the absence of privity between the plaintiff and defendant consistently fails to appreciate the fundamental distinction between direct and derivative harms. If an outside party persuades an employer to terminate a black employee, that employee has been directly injured. And if the outside party instead "forces the worker off the job by threatening to kill him if he does not quit or ask for a reassignment," Resp. Br. 44, by burning his home, *id.* at 29, or by beating him up, *id.* at 27, the injury is also direct. But McDonald's theory is that "Domino's prevented McDonald from carrying out his duties as JWM's president and operator," *id.* at 44, not because of any direct injury to himself—but instead simply because JWM itself lost the Domino's contract. Unlike in his hypotheticals (and the similar scenarios he draws from the legislative history), that injury is purely derivative of harm to a third party. The same is true of all of McDonald's personal financial injuries, and of his emotional injuries not

directly attributable to the alleged slur. These injuries were not inflicted on McDonald directly or caused by any change in his own employment status; they are the derivative consequences for JWM's owner of JWM's loss of the Domino's contract and eventual bankruptcy. *Supra* at 12 n.7.

Nothing about the text or history of § 1981 suggests an intent to permit recovery for derivative injuries in circumstances like these. The plain language protects only a personal right to "make and enforce contracts"; it does not suggest any intent by Congress to confer a substantive right to be free from the derivative consequences of a violation of *someone else's* right to make and enforce contracts. This Court held in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972), for example, that the Fair Housing Act gives residents of housing facilities "an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Warth v. Seldin*, 422 U.S. 490, 513 (1975). But in *Warth* this Court squarely rejected an argument that § 1981 grants similarly expansive rights—dismissing claims of taxpayers alleging only derivative injuries on the ground that § 1981 did not "expressly or by clear implication grant[] [them] a right of action." *Id.* at 510.

This Court has repeatedly declined to recognize causes of action for derivative injuries even when statutory language seemingly authorizes very broad recovery. Pet. Br. 21, 38. By contrast, the private right of action under § 1981 has been implied by the courts. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-32 (1989). It would be especially inappropriate to infer an intent to abrogate the long-standing presumption against recovery for derivative injuries where Congress has not spoken to the issue at all.[10]

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[10] *See Holmes*, 503 U.S. at 287-88 (Scalia, J., concurring) (recognizing heightened judicial responsibility to supply reasonable limits on implied rights of action); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723,

The practical concerns that have led this Court to deny causes of action for derivative injuries in the past are also fully present in this case. First, permitting employees to sue for indirect "personal" injuries whenever their employer loses a contract for allegedly discriminatory reasons would saddle the courts with daunting proof problems (such as untangling whether particular injuries are attributable to that lost contract or mismanagement of other projects) and force them "to adopt complicated rules apportioning damages ... to obviate the risk of multiple recoveries." *Holmes*, 503 U.S. at 269. For example, employees (like McDonald) claiming to have lost discretionary "salary" such as merit bonuses would force the courts to determine "the extent to which the affected employ[er] absorbed [its] losses and continued to pay" such bonuses, or instead passed its losses on to its employees. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983); *see also Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (barring indirect purchaser antitrust suits in light of such difficulties). The financial injuries claimed by McDonald overlap with or duplicate injuries suffered by JWM—which is not surprising since JWM's demise was the proximate cause of McDonald's financial difficulties.[11]

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749 (1975) ("We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question."); *United States v Standard Oil Co.*, 332 U.S. 301, 314-15 (1947) (declining to recognize federal common law action for "tortious interference" for derivative injuries in the absence of clear direction from Congress).

[11] McDonald attempts to resuscitate a claim that Domino's interfered with his relations with his banks. Resp. Br. 2-3. But he has conceded that those banks' contracts were with JWM, and indeed that JWM has *already raised and settled* its tortious interference claims against Domino's based on those contracts. *See* Trustee's Motion and Mem. for Order Approving Stipulation with Domino's Pizza LLC and Affiliates, *In re JWM Invs., Inc.*, No. BK-S-00-19303-LBR, at 5 (Bankr. D. Nev. May 22, 2002) (in support of settlement approved by court, trustee addresses "Debtor's fifth cause of action alleg[ing] that Domino's had intentionally interfered

"[T]he task of disentangling overlapping damages claims is not lightly to be imposed upon ... litigants, or upon the judicial system." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982). And the insolvency of the "victim directly injured" adds further concern because "a suit by an indirectly injured victim could be an attempt to circumvent the relative priority its claim would have in the directly injured victim's liquidation proceedings." *Holmes*, 503 U.S. at 274. As JWM's sole shareholder, McDonald was of course the lowest priority creditor in its bankruptcy.

Second, permitting employees to sue under § 1981 for derivative injuries would authorize massive and complex litigation. Again, if GM cancels its IBM contracts because IBM has too many black employees then every black employee who can allege personal injuries would have a cause of action under McDonald's test, and be entitled to separately litigate the question of GM's intent.[12]

Third, these concerns are entirely avoidable, since in this context "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269-70. Courts have consistently allowed § 1981 claims by corporations as the directly injured parties. The corporation's damages for breach are straightforward, unlike derivative employee claims that would require courts to separate out the multiple reasons that, for example, an employee did not receive a higher bonus. The corporation

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with the Debtor's relationship with Desert Community Bank, Nevada First Bank and other financial institutions," and concludes after investigation that "there simply has been no evidence supporting the claim").

[12] *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) ("Due process prohibits estopping [plaintiffs who have not previously appeared] despite one or more existing adjudications of the identical issue which stand squarely against their position.").

will also be in the best position to evaluate whether the breach truly was discriminatory, as it will have access to the full scope of relevant information about the contractual relationship. And the corporation's much larger damages will give it an incentive to pursue the claims.

Fourth, permitting derivative claims by employees would introduce anomalies that are inconsistent with the language and the plain intent of § 1981. Section 1981 guarantees that "all persons" shall have "the same right" "to make and enforce contracts" as "white citizens." Like other discrimination statutes, § 1981 thus focuses on treatment in the workplace that differs based on race. *See, e.g.*, 42 U.S.C. § 1981(c) (rights protected by § 1981 are guaranteed "against impairment by nongovernmental discrimination"); *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1504 (2005) ("discrimination" means that "the complainant is being subjected to differential treatment"). But McDonald's theory of derivative recovery would encompass claims in which minority employees are treated *identically* to their white co-workers. If GM cancels its contract with IBM because IBM employs too many minority employees, and IBM is forced to lay off part of its work force, the white employees who lose their jobs have suffered the same injuries to their employment rights as the black employees, for the same reason. GM's breach may violate IBM's right to contract on non-discriminatory terms, but it did not cause IBM to impose discriminatory terms in contracts with its employees. McDonald would grant the black employees—but not the white employees—a right to sue for common injuries arising out of equal treatment by their employer. (McDonald concedes that "his right to nondiscriminatory performance by [JWM]" was not infringed. Resp. Br. 45.)

Finally, the fact that a plaintiff can allege that the derivative injury it suffered was intended by the defendant "is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated Gen. Contractors*, 459 U.S.

at 537. The plaintiff unions in *Associated General Contractors* also alleged a specific intent to injure them, but this Court ruled that even if true that fact was not sufficient to overcome the common law presumption against causes of action for derivative injuries. This Court implied that the employees of the unionized subcontractors that lost work because of the conspiracy also could not sue, even though injury to those employees was certainly the principal object of the conspiracy.[13] As McDonald's arguments in this case demonstrate, any plaintiff alleging that a defendant canceled a contract because it did not wish to do business with its counter-party's minority employees can also allege that the defendant intended to harm those employees. A specific intent requirement is therefore wholly incapable of confining McDonald's expansive interpretation of § 1981 within manageable bounds. Particularly since McDonald concedes that the common law would not have permitted recovery for tortious interference in a situation like this one, Resp. Br. 43, there is no good reason to open that door.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions that it be dismissed.

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[13] *Associated Gen. Contractors*, 459 U.S. at 541 n.46; *see also, e.g., Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 28 (D.C. Cir. 1987) (employees of airline driven out of business cannot sue for derivative injuries, despite allegation that harm to those employees was intended and "vital to the alleged conspiracy"), *cert. denied*, 485 U.S. 934 (1988), *and cert. denied*, 485 U.S. 961 (1988); *Brian Clewer, Inc. v. Pan Am. World Airways, Inc.*, 674 F. Supp. 782, 784, 787 (C.D. Cal. 1986) (travel agent also cannot sue despite allegation that defendants acted "with the object ... of damaging [his] business"); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 929 (9th Cir. 1994) (law firm cannot sue for derivative injuries despite "specific intent to cause harm to it").

Respectfully submitted,

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